

TORTS FINAL EXAMINATION
Professor Sophie Sparrow – Fall 2008

General Instructions

This is an open-book take-home exam.

This exam has 11 pages. Be sure you have all of them.

Exam number identification only:

1. Use **only** your assigned **Exam Number** for this exam.
2. **Do not** use your name or Social Security Number anywhere.
3. **Do not** provide any identifying information anywhere on the exam.

Providing any identifying information on or after the exam and before the exam is returned is a violation of the Pierce Law conduct code.

Typeface, font and format for questions:

1. All parts of this exam must be typed.
2. Put your exam number in the header of your exam document – on the right-hand side. This ensures that your exam number is on each page.
3. Use 12 point Times New Roman type.
4. Double-space lines throughout.
5. 1” margins all around.

This examination is worth **22.5% of your grade** in the course.

PART I

Part I of the exam consists of 10 multiple-choice questions. Part I of the exam is worth **30 points**; each question is worth 3 points. Facts from or answers to previous questions do not apply to subsequent questions unless indicated.

For each **multiple-choice question**, write the **number of the question**, followed by the **letter** that corresponds to the best answer. Select only one letter for each question. Be sure to label the numbers of the questions – random letters on the page don't count.

Example:

1. A
2. C

You **may** explain your answers **by writing the responses below the answer**. You **do not** need to explain any answer to a multiple-choice question.

If you choose to write an explanation, you will not lose any points for a correct answer no matter what your explanation says. If your explanation of an incorrect answer shows an ambiguity or problem in a question or response option, and your explanation shows that you understand the relevant concept and its application to the facts in the question, you will receive full credit for your answer.

If you write an explanation, you must limit it to a maximum of **150 words**.

To be considered, all Part I answers and optional explanations must be typed in your exam document. All selected answers and optional explanations must be labeled clearly.

PART II

Part II of the exam consists of an essay and two questions. It is worth **70 points**. Both questions relate to one fact pattern.

Question 11 (35 points) 1250 words (5 pages maximum).

Question 12 (35 points) 1250 words (5 pages maximum).

I will not answer any questions during the exam.

Because some of your classmates may be taking the exam at a different time, **do not discuss the exam until you are authorized to do so**. You are responsible for ensuring that **no information** about this exam is heard or made known to any student who has not yet taken this exam and fully completed it.

"Tips" for taking this examination:

- Read the "call of the question" and the specific instructions first. Determine the specific relevant legal issues before reading through the entire fact pattern.
- Read the questions carefully before beginning to write your response. The facts are critical to analyzing the questions asked.

- For an essay question, **map out or outline** your response. Often there will be multiple parts – elements, factors – that require you to address many different points. Having a sense of how many different points you need to address will help you allocate the time you spend on each.
- State any assumptions you make.
- Use **headings**. They make a big difference and will help you organize your thoughts. Headings by elements and factors are very helpful.

I will be looking for your ability to:

- Identify the legal issue(s) raised by the specific facts;
- Identify which issues are in dispute and which are unambiguous;
- **Confine** your analysis to the specific issue(s) raised, rather than discussing general tort law;
- Show your knowledge of legal principles and "rules;"
- Apply relevant legal principles and "rules" to factual situations; and
- Present your responses in a concise, precise and organized way.

You know a lot about torts. Remember that I can assess your knowledge and abilities only by what I see and can understand in your written responses; **EXPLICITLY show the steps in your reasoning.**

Best wishes for a successful end of semester and wonderful break. You can all be highly successful attorneys!

Question 1.

David and Patty are roommates in an apartment. David was annoyed with Patty because she had recently borrowed David's suede leather jacket. Patty had not asked David first and David discovered it was now badly stained. Determined to make Patty's life miserable, David sprinkled itching powder on the shag rug in Patty's bedroom. Because the itching powder and shag rug were both off-white, the presence of the itching powder was not obvious. David knew that Patty usually did about an hour of stretching exercises each night, and knew that Patty usually did her exercises barefoot. As expected, Patty's feet touched the itching powder. Unknown to Patty or David, Patty was allergic to the powder. When her feet came in contact with the powder, Patty had a severe allergic reaction and ended up in the emergency room. **In bringing a claim against David, Patty could at most recover:**

- A. Nominal damages.
- B. Nominal damages and medical expenses.
- C. Medical expenses, any lost wages, pain and suffering.
- D. Medical expenses, any lost wages, pain and suffering, and punitive damages.

Question 2.

Paula worked at a steel refining plant. Darren, a client visiting the plant, failed to look where he was going one day, and carelessly knocked over a container of machine parts. Some of these parts were round and rolled onto different areas of the plant's floor. Paula's co-worker, Neil, who was operating a welding torch, stumbled when he stepped onto one of these machine parts. His welding torch, which blasted flames, flew out of his hands and landed near a cauldron of melting steel. The cauldron of melting steel ignited, setting the surrounding area on fire. Neil was engulfed in flames, and suffered severe burns. Many yards away, at the other end of the plant, Paula witnessed Darren's knocking over the container, Neil's slip and fall and Neil being engulfed in flames. Neil survived the accident, but was hospitalized for weeks. Paula was not part of the accident or physically harmed by it in any way, but she was traumatized by witnessing it. She had recurring nightmares and flashbacks about Neil being burned, became unable to enter the plant without suffering uncontrollable shaking, and had severe panic attacks whenever she saw any flame, no matter how small. Paula received treatment for her trauma, and had to take a disability leave from work. **Paula sued Darren for her emotional and physical injuries. You represent Darren. Your best argument would be to:**

- A. Move to dismiss Paula's claims because she was not a foreseeable plaintiff.
- B. Move to dismiss Paula's claims because she did not suffer sufficient physical or mental injury.
- C. Move to dismiss Paula's claims because she was negligent in observing the accident.
- D. Move to dismiss Paula's claims because she did not suffer a foreseeable injury.

Question 3.

Standing on a crowded city sidewalk, Ponzi and Dee, strangers, were standing side by side waiting for the city bus. Ponzi was talking loudly on his cell phone. Dee made a point of glaring at Ponzi, hoping that he would either stop talking or lower his voice. Ponzi kept talking loudly, seeming to ignore Dee's glares. Dee faked a cough, then spat directly at Ponzi's feet. Spit landed on Ponzi's worn and soiled hiking boots.

Ponzi sues Dee for spitting on his boots. As the judge, you should:

- A. Grant a motion to dismiss because Ponzi did not suffer actual damages.
- B. Grant a motion to dismiss because Ponzi could be expected to be spat upon while waiting for the bus on a crowded city sidewalk.
- C. Deny a motion to dismiss because Ponzi had no duty to mitigate his damages.
- D. Deny a motion to dismiss because Ponzi suffered an offensive contact.

Question 4.

Dora, a therapist, has been treating Marvin for 5 years. Marvin is a diagnosed kleptomaniac (has a compulsive urge to steal). Marvin usually has control of his kleptomania, but when he is under stress, his urges to steal become stronger. Marvin is a very skilled thief; he never harms people when he steals. Marvin has recently learned that his long-term neighbor and friend, Polly, is about to be shipped a \$50,000 diamond ring from her grandmother. Polly would love to keep her grandmother's ring, but owes \$40,000 to the local hospital for necessary medical treatment she received. Polly plans to sell the ring so she can pay the medical bills. Polly has told Marvin that because there is such high risk of theft, she has been told she must be at home at a certain time to receive the ring from the shipping company. Marvin tells Dora that Polly's ring will be delivered on Monday, 12/22/08 at 10:00 a.m. and he plans to steal it. He knows it is wrong, but he is under stress from the holidays and feels a strong compulsion to steal Polly's ring. Based on her five years of treating Marvin, Dora believes that he will steal Polly's ring, but not physically harm Polly. **Dora has come to you for advice about what she is legally required to do. Your best advice to Dora would be to:**

- A. Do nothing; a therapist generally has no duty to control a client's actions.
- B. Do nothing; therapists may not reveal confidential information about their clients.
- C. Warn Polly that Marvin may steal her ring because it is highly likely that Marvin will commit a serious crime against a specific third party.
- D. Inform local law enforcement officials about Marvin's likely theft because Dora has a duty to take reasonable efforts to protect Polly from a serious threat.

Question 5.

On Monday, Patrick's parents bought a window shade to install in Patrick's room. They left the window shade in the hallway outside Patrick's room and told him that they would install it that weekend. They also told him not to try to install it himself. Patrick, age 11, wanted to have the new shade installed immediately. He looked at the directions for installing the shade and figured he could do it himself. He had experience building things with his parents, and knew how to operate basic tools. On Thursday afternoon he decided he would go ahead and try to install the shade. Following the directions that came with the window shade, Patrick used the family's electric drill to drill holes in the ceiling above the window. This was a brand new Destinghouse cordless electric drill, made in 2008. Unfortunately, Patrick struck a piece of metal in the ceiling, which caused the electric drill to bounce back and jerk out of his hand. Even though Patrick released the button that activated the drill, the drill did not stop, but fell on his arm and cut him badly. Federal safety regulations require that all electric drills stop when the activating buttons are released. The Destinghouse electric drill was designed to stop when its activating button was released, but Patrick's family's model did not conform to Destinghouse specifications. Patrick seeks to sue Destinghouse for his injuries. **You know you need many more facts, but based on the preliminary facts above, as the family's lawyer, your best prediction is that:**

- A. Patrick will likely recover damages from Destinghouse because Destinghouse's electrical drill failed to conform with federal safety regulations.
- B. Patrick will likely recover damages from Destinghouse because his parents' Destinghouse's electrical drill failed to conform to Destinghouse's specifications.
- C. Patrick will likely recover damages from Destinghouse if he can prove that Destinghouse was negligent when it made this particular drill.
- D. Patrick will likely recover damages from Destinghouse if he can prove that Destinghouse's lack of adequate warnings made the drill not reasonably safe.

Question 6.

Driving his car on a busy and fast-moving city highway, Plato crashed into Delia's car when it suddenly and unexpectedly stopped in front of him. Delia's new car had stopped when it ran out of gas. Before she started driving, Delia noticed the engine light signaling her to refuel, but thought she could drive for several miles before she would run out of gas. **Which of the following statements is most accurate?**

- A. Plato would not be expected to foresee an accident on a fast-moving city highway.
- B. Plato assumed the risk of injury when he drove on a fast-moving city highway.
- C. Delia is the cause of Plato's damages.
- D. Delia's failure to refuel contributed to causing Plato's damages.

Question 7.

Patricia heard that the Dagwood Convention Center was hosting the annual private convention on “Innovation Technology for Water Conservation.” Patricia, who owned a water conservation business, did not want to pay the \$450 entrance fee for the convention but wanted to learn about her competitors’ products. Accordingly, she dressed up as a Dagwood Convention Center employee and, carrying a tray with bottled water, snuck into the convention room using the “employees only” entrance. While she was walking around the convention room she stumbled and fell when she tripped on a bright orange extension cord that was lying on the convention center floor. A Dagwood Convention Center employee had carelessly forgotten to tape the cord; the custom at all convention centers was to tape all extension cords to the floor. The employee’s negligent placement of the extension cord caused Patricia to fall, resulting in Patricia tearing two ligaments in her knee. Patricia suffered severe pain and incurred significant medical expenses and loss of income. **She has asked you, her lawyer, whether she is likely to successfully sue Dagwood Convention Center in negligence for causing her injuries. Your most accurate advice to Patricia would be that:**

- A. Patricia will not likely recover damages unless she can prove that she had permission to be at the conference.
- B. Patricia will not likely recover damages unless the employee’s failure to tape was done in part to serve the Dagwood Convention Center.
- C. Patricia will likely recover damages because Dagwood’s employee failed to follow custom, showing that its employee was negligent.
- D. Patricia will likely recover damages because a loose extension cord lying on Dagwood’s convention room presented a risk of serious injury.

Question 8.

In a rural part of the state, Dabir, age 6, took a lighter from the kitchen of his parents' home and, intending to cook some food, went behind his neighbors' barn to light a fire. He had seen his parents start fires and light candles. However, his parents had told him never to build a fire without adult supervision or close to buildings, and Dabir had never built a fire on his own. The fire burned under control for a few minutes and then Dabir attempted to put the fire out by dousing it with water, covering it with dirt and stamping on it. The next morning, Dabir's neighbors discovered that their barn was on fire. The barn was badly damaged, and the neighbors sued Dabir and his parents. **As the judge, you are asked to determine what standard of care the jury should apply to Dabir’s actions. Your best choice would be to ask the jury to use the following standard of care:**

- A. A child of the same age, capacity, intelligence, and experience under the same or similar circumstances.
- B. A reasonably prudent person under the same or similar circumstances.
- C. A person engaged in abnormally dangerous activities.
- D. A reasonably prudent person with a similar physical disability.

Question 9.

Dido's Garage Inc. operates an automobile repair garage in a very secure, quiet, and rural part of the state. Pete brought his truck to Dido's for repairs. To make repairs, Dido's had to order a part for Pete's truck. While waiting for the part to be delivered, Dido's stored Pete's truck in an unfenced area between the garage and an adjacent street. While Pete's truck was stored there, its transmission disappeared. Dido's never learned how the transmission was taken, never recovered it, and told Pete it had been stolen. Pete sued Dido's for failing to use reasonable care in protecting his truck while in Dido's custody. **At trial, Dido's owner testified that the other garages in the area regularly stored vehicles in unfenced areas. The judge should rule that:**

- A. Because Dido's adhered to the customary practices among garage owners in the area, Dido's did not breach its duty of care.
- B. Because other garage owners regularly left cars in unfenced areas, their customary practices determined what the reasonably prudent garage owner would do under similar circumstances.
- C. The fact finder could consider the customary practice of leaving cars in unfenced areas as evidence of Dido's reasonable behavior.
- D. Customary practice should be inadmissible because leaving cars in unfenced areas is unreasonable.

Question 10.

Potter is a professional jockey who has been riding in horse races for ten years. Just after he left the starting gate, Potter's horse veered away from another horse approaching on his right, and stumbled on a clod of dirt in the racetrack. Potter fell and injured his back. Potter sued the racetrack owners for failure to use due care in maintaining the racetrack. **As counsel for the racetrack, your best argument to reduce or prevent liability is to argue:**

- A. Eliminating clods is too expensive compared to the occasional injuries that occur from stumbling horses.
- B. Racetrack owners customarily have clods of dirt in their racetracks.
- C. Potter assumed the risk of racing-related injuries because he was experienced with horse racing, knew about the severity and likelihood of risk, and chose to participate.
- D. Potter's damages should be reduced by Potter's negligence in controlling the horse.

Part II – 2 Essay Questions.

- Assume that all parties in this fact scenario are adults of reasonable intelligence and without any physical or mental disabilities.
- Assume that the accidents described below are physically possible and happened as described.

Davood Malls, Inc. (DMI) owns and operates a mall in a U.S. state. During the holiday season, as is customary for malls nationwide, DMI allows independent vendors to rent space in its common areas so that they can sell their wares to mall shoppers. Each independent vendor pays DMI rent in exchange for space. DMI provides no insurance coverage or any guarantees for services to these independent vendors. Vendors provide their own carts, displays, products, services, signs and all related business materials. Vendors agree to keep their areas clean and to place all trash in large bins DMI provides. In turn, DMI in turn provides cleaning services for the common areas. DMI also employs on-site staff who provide maintenance, customer support, emergency health, and security services.

Over the past six months DMI, like many businesses, suffered major financial losses. Retail sales had been down, and projections for the holiday season were that income would be significantly lower in 2008 than in the past. As a result, DMI laid off a number of its staff, retaining only a very limited number of employees to provide essential services. By significantly reducing its staff, DMI was operating its mall with fewer service employees than was customary for similarly-sized malls.

Starting in December 2008, Yang, who had immigrated to the US from Laos in November, rented space from DMI to sell Laotian products she had imported. Yang sold handicrafts and accessories such as carved figurines, dishes, and jewelry. Yang followed the custom of some of her business colleagues in Laos and other parts of Asia, providing shoppers with a small cup of herbal tea as they looked over the products in Yang's cart. Yang brewed the tea at home, bringing a large insulated container with her to the mall every day. As the holiday season progressed, increasingly large numbers of people shopped at the DMI mall. Because Yang's cart displayed wonderful colors, had unique and relatively inexpensive handicrafts and accessories, and Yang herself always looked happy, many people at the mall were attracted to her cart, stopped and bought items from her. Most of these shoppers willingly accepted Yang's offer of tea, which Yang provided in a small cardboard cup.

Starting on Saturday, December 13, 2008, the mall became particularly busy—surprisingly so, given the economic recession—and Yang was doing a lot of business. Almost all of Yang's customers gratefully accepted the cup of warm tea, and then continued on to do other errands in the mall, carrying the cup of tea with them. Yang had a trash can at her cart, and customers who finished their tea at her cart tossed the empty cardboard cups in it. Those who continued down the mall carrying their cups usually placed their empty cups in a large public trash container fifty feet away from Yang's cart (Bin A).

On December 17, all the trash bins in the mall, including Bin A, were filling quickly, given the large numbers of people at the mall. DMI's small number of employees performing security, maintenance, cleaning, and customer care services were extremely busy. By 11:30 a.m., Rachel, a security officer, whose duty it was to patrol throughout the mall, noticed that the mall trash bins were quickly filling. She knew that her job was to tell her supervisor so that her supervisor could send someone to empty the trash; alternatively she knew that she was supposed to empty them herself if she was not actively engaged in some security or other emergency issue. Rachel, however, did not want to take out the trash. Even when, at 12:15 p.m. she saw that Bin A was overflowing with trash starting to pile up around it, she decided to wait for someone else to clean it up. Rachel continued to patrol the mall all afternoon. She noticed the overflowing trash, but did not further notify her supervisor, correctly thinking that if she mentioned the trash problem again, her supervisor would direct her to take care of it.

At 6:15 p.m. the same day, Parvi, a fitness instructor and personal trainer, was shopping at the mall when he slipped and fell on some trash near Bin A. Much of the trash on the floor contained discarded cardboard cups from Yang's customers. Leftover tea had come from the mostly-empty and discarded cups and spread to other trash and along the floor. The mall's tile floor was slippery when wet, and when Parvi stepped on the sodden trash, he fell down hard. Parvi was wearing running shoes and comfortable clothing. Parvi broke his pelvis in the fall and had to be in a wheelchair for 8 weeks. He was out of work for 3 months, and lost a number of individual clients because of it. Within 4 months, Parvi had completely recovered.

Yang has hired you to advise her about her liability for Parvi's injuries. She saw the commotion when Parvi fell and heard Rachel and others talking about she shouldn't be providing tea to her customers. A neighboring vendor also made her worried because a state law prohibits anyone from selling food or beverages without a license. The act is contained in a section on Health and Safety-Food and Drug Laws. Yang has a vendor's license to sell her products, but no license to sell food or beverages.

Yang has asked you provide her with answers to the following questions on the next page.

Question 11 (35 points).

- Identify and analyze Parvi's best claim of negligence against Yang for his injuries.
- Do not consider the weaknesses of Parvi's claim in this question.
- Do identify the basic kinds of damages Parvi would be eligible to recover should he be successful.
- **1250 words maximum – 5 pages**

Question 12 (35 points).

- Identify and analyze the strongest arguments Yang can make in defending Parvi's claim for negligence to reduce or eliminate her damages.
- In doing so, identify the relative strengths of Yang's arguments.
- **1250 words maximum – 5 pages**

In answering questions 11 and 12, use law, facts and policy. Policy arguments do not need to be made for each element. Instead, apply policy to the overall analysis or to one of the more ambiguous elements.

Scoring these essays is similar to scoring on the team assessments and essays from previous years. Identifying legal issues and applying specific facts to legal principles – showing the analysis to the reader – is most important. About 5% of the grade is on policy. Around 10% of the grade will be based on writing and organization. Because of the word/page limits, focus your analysis on the areas with the greatest ambiguity.

And thank you for a terrific semester.

You have made this semester truly wonderful!